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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 684.

SID RICHARDSON CARBON & GASOLINE CO.,
Petitioner,

v.

THE MOORE COMPANY OF SIKESTON, MISSOURI, and J. E. MOORE, JR.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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BRIEF

In Opposition to Petition for Writ of Certiorari.

OPINION BELOW.

The opinion of the District Court is reported in 237 F. Supp. 817 (1964). The opinion of the Court of Appeals for the Eighth Circuit is reported in 347 F. 2d 921 (1965).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 13, 1965. Petitioner's Petition for Rehearing was denied on August 12, 1965. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1) Whether the filing of the complaint in this federal antitrust case is a commencement of the action sufficient to toll the applicable federal statute of limitations, 15 U. S. C., Section 15b, when summons was issued and service made on the same day upon the petitioner, but was later quashed on the petitioner's motion.

2) Whether by dismissing the present complaint on the ground that the filing of the complaint was insufficient to toll the statute of limitations because of respondents' lack of due diligence in obtaining valid service upon the petitioner, the district court abused its discretion since another district judge in the same case had previously overruled the identical contentions of the petitioner with regard to the alleged lack of diligence on the part of respondents and had reinstated the cause to the docket.

STATUTES AND RULES INVOLVED.

The statutes and rules involved are set out in Appendix A to this brief.

STATEMENT.

This is a private action under the Robinson-Patman Act covering the period from October 23, 1957 (four years prior to the filing date of the complaint) to September 1, 1959. The complaint was filed on October 23, 1961 and summons issued and service made on the same day upon a vice president of petitioner in Cape Girardeau, Missouri.

On May 7, 1962, District Judge Harper sustained respondents' motion to quash the service upon the ground that the petitioner is organized under the laws of the State of Texas, was not subject to service of process in Missouri, and that the officer served was in Missouri only for the purpose of appearing as a witness in another case (R. 9-11).

On September 14, 1963, District Judge Harper, on his own motion, dismissed the complaint for want of prosecution (R. 11). Thereupon, respondents employed present counsel. On September 24, 1963, respondents filed their motion to set aside the order of dismissal, on the ground that the general venue statute, 28 U. S. C., Section 1391 (c), heretofore relied upon, was not controlling; that 15 U. S. C. 22 was applicable, and that, while original counsel had failed to consider this special venue provision of the antitrust laws, the substantive rights of respondents should not be irreparably forfeited because of such failure (R. 12-13).

By leave of court, petitioner filed a brief amicus curiae challenging all grounds of respondents' motion, and contending that the action had been properly dismissed for respondents' lack of diligence in prosecuting the same (R. 17-19).

On December 13, 1963, District Judge Harper sustained respondents' motion, overruling petitioner's arguments,

and reinstated the cause to the docket (R. 20). On January 13, 1964, by prior leave of court, respondents filed an amended complaint, which did not change the basic cause of action. It was served on petitioner in Texas on January 17, 1964, under 15 U. S. C. 22 (R. 20-24, 50).

No motions whatsoever attacking either the order of Judge Harper reinstating the cause to the docket or his leave to file the amended complaint were filed by petitioner, which appeared and filed an answer raising various defenses, including the statute of limitations, 15 U. S. C. 15b (R. 25-27).

Extensive discovery proceedings were conducted by both parties (R. 27-31, 50-54). On September 28, 1964, petitioner filed its Motion for Summary Judgment upon the ground (among others not material here) that the action is barred by the federal statute of limitation, contending that the statute is not tolled merely by commencing an action under Rule 3, F. R. C. P., but requires also reasonable diligence in obtaining valid service and that respondents failed to exhibit same (R. 31-32).

District Judge Meredith, to whom, upon rotation, this case had been assigned, sustained the motion upon this ground and dismissed the complaint. He held that respondents showed lack of due diligence both in their avowed ignorance of 15 U. S. C. 22 and in failing to obtain service upon petitioner through the Secretary of State of Missouri under R. S. Mo., Section 351.630 (R. 38-39, 237 F. Supp. 817, l. c. 819).

On appeal by respondents, this judgment was reversed by the Court of Appeals for the Eighth Circuit. After petitioner's Motion for Rehearing was overruled by the Eighth Circuit, petitioner filed its present Petition for Certiorari.

ARGUMENT.

I.

The Decision Below Is Clearly Correct.

Petitioner's statement of the question before this Court is far broader than the specific issue, the determination of which is presented in this case. The court below did not decide that in all cases due diligence in obtaining service is irrelevant to toll **any** statute of limitation or even any **federal** statute of limitation, as inconsistently suggested by petitioner (Petitioner's Brief, p. 15 and pp. 2-3, respectively).

To focus attention on precisely what is offered as an issue for Supreme Court determination, it should be pointed out that the court below was concerned only with tolling the **antitrust** statute of limitation, 15 U. S. C. 15b, under the circumstances present in the instant antitrust action.

At the outset, the court correctly noted that the pending action was created by federal statutes, and is subject to a federal statute of limitation. Hence, federal law controls in determining whether the action was properly commenced with the effect of tolling the statute. **Ragan v. Merchants Transfer & Warehouse Co.**, 337 U. S. 530, 533. Cf. **Hanna v. Plumer**, 380 U. S. 460.

15 U. S. C. 15b provides:

> "Any action to enforce any cause of action under Sections 15 or 15a of this title shall be forever barred unless **commenced** within four years after the cause of action accrued" (our emphasis).